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WILLIAM H. HIATT, WARDEN, PETITIONER

v.

EUGENE PRESTON BROWN, RESPONDENT

Originally No. 339
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RESPONDENT BROWN'S MOTION FOR REHEARING (MARCH, 1950)

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I.

At the court-martial trial, the decision in regard to guilt was by two-thirds vote. This was admitted by the Warden (R. 7 and 14, paragraph 58) and appeared on the face of the record of trial by court-martial (2 R. 96).

Since the minimum punishment for murder is life imprisonment, the conviction upon a charge of murder requires a three-fourths vote (Respondent Brown's brief, pages 48-50).

The argument to the contrary, set forth in the Warden's reply brief, page 10, is that after conviction for murder, the court considers separately the question of sentence and if it does not vote either unanimously for the death sentence or three-fourths for life imprisonment, then a second ballot in regard to sentence is taken, and if the deadlock is not broken on this second ballot, the court returns to the previous question of guilt or innocence and

according to the Warden's brief (page 10), "there is only one alternative open to the court—to revoke its finding of guilt of murder and find the accused either not guilty or guilty of a lesser included offense."

For example: unanimously a court votes an accused guilty. Upon the question of sentence, all except one vote for the death penalty. An additional ballot in regard to sentence again results with all but one voting for the death penalty. Then, despite the fact that all members have decided that the accused is guilty, they return to the question of guilt or innocence and find the accused not guilty of any offense, or guilty of the lesser offense of manslaughter.

A second example: two-thirds vote for conviction for rape or murder. Then, under the mistaken belief that this is sufficient, the court separately considers the sentence. All who voted to acquit consider that point already adjudicated and they vote for a life sentence. Some who voted to convict vote for a life sentence. The total votes for a life sentence amount to three-fourths. The theory of the Warden is that that suffices to impose a life sentence.

A third example: unanimously the court finds an accused guilty of murder. Upon the subsequent ballot in regard to sentence, half vote for death and half vote for life imprisonment. This deadlock in regard to sentence occurs again upon another ballot. Now, although all believe the accused guilty, the Warden contends that they must re-examine the question of guilt, and reach a finding of not guilty, or guilty of a lesser offense, manslaughter.

Unless at that time Congress had expressly provided for such amazing results, no administrative interpretation has weight enough to compel such absurdities.

The source of the confusion is the theory that a conviction for rape or murder does not automatically carry a life sentence when death is not unanimously agreed upon. That faulty premise may be expected to lead to absurd conclusions.

The true conclusion is attained by following the true premise: once a conviction for rape or murder has been lawfully made, life imprisonment is automatic unless death is unanimously voted. Therefore, the conviction for rape or murder is automatically at least a life sentence, and for conviction for rape or murder a three-fourths vote is required. This is the only interpretation that makes sense.

In *Stout v. Hancock*, 146 Fed. 2d 741 (CCA 4-1945), certiorari denied 325 U. S. 850 (1945), Judge Parker wrote (page 744): "Conviction and sentence are two separate steps in a court-martial proceeding (Winthrop's Military Law and Precedents, page 392); and after conviction has been voted in a prosecution for murder or rape, the only punishments permissible under the law are death and life imprisonment. The vote on punishment is but a choice between these two; and, unless there is a unanimous vote in favor of the death penalty, life imprisonment necessarily follows."

Since at least life imprisonment necessarily follows, a three-fourths vote is necessary for conviction. Incidentally, there was a three-fourths vote in *Stout* v. *Hancock*.

(The statute under interpretation has since been amended, apparently upon ex parte application of the Army.)

II.

The long line of authority that jurisdiction is lost when due process or the right to counsel is violated would be

overruled by the decision of March 13. *Frank* v. *Mangum*, 237 U. S. 309 (1915); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Bridges* v. *Wixon*, 326 U. S. 135 (1945); *Eagles* v. *United States*, 329 U. S. 304 (1946); *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948); *Price* v. *Johnston*, 334 U. S. 266 (1948); *Wade* v. *Mayo*, 334 U. S. 672 (1948).

Due process and the right to counsel are therefore jurisdictional questions to be considered on habeas corpus. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 91 (1913); *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920); and *Vajtauer* v. *Commissioner*, 273 U. S. 103 (1927); *Humphrey* v. *Smith*, 336 U. S. 695 (1949). See *Halsbury, The Laws of England*, Vol. 25, pages 90-91.

In re Grimley, 137 U. S. 147 (1890) and *Swaim* v. *United States*, 165 U. S. 553 (1897) are obsolete.

In re Yamashita, 327 U. S. 1 (1946) expressly left open the present point; see pages 9 and 23.

In the courts, the constitutional rights of due process and the right to counsel are understood and respected. In administrative law, they are in greater danger of infringement. The danger increases in proportion to the size of the executive branch of government. Among administrative departments, the Army is the largest. And the speed of its procedure causes miscarriages of justice. Its court-martial system does not consider justice the sole criterion of decision. Discipline has great weight. *33 Virginia Law Review 274-276; 33 American Bar Association Journal 41, 286, 898, 899; 13 Chicago Law Review 500; 48 Columbia Law Review 221-224.* When a prisoner has been committed to a civilian prison for a long term of years, considerations of discipline have been satisfied. Equality before the law requires equal treatment for him

and his cellmate, a civilian prisoner. Particularly because Brown is innocent of any crime, and was convicted by violations of due process and the right to counsel.

III.

What has been stated in ground 2 above also applies to the right to the assistance of counsel.

IV.

The decision in regard to the law member not being a member of the Judge Advocate General's Department assumes a principal point at issue: whether the general who appointed the court-martial considered the question of whether an officer of the Judge Advocate General's Department was available for the purpose of appointment as law member. There is not one scintilla of evidence that he did. The point could have been proved by affidavit under habeas corpus procedure. There is no presumption that the question of availability of a JAGD officer was considered. *9 Wigmore on Evidence (3d Ed) 488, section 2534.* Nor is it probable that the very able counsel for the Warden overlooked this point. Over two months elapsed between the filing of the petition and the trial.

V.

Our point that a statute allowing an appeal by a custodian in a habeas corpus case is contrary to the Constitution was not decided. (Pages 14 and 15 of our brief.)

In *Ex parte Billings*, 46 Fed. Supp. 663 (D. C. Kansas 1942): "It is a writ which cannot be abrogated or its efficiency curtailed by legislative action. Its position is made secure by the provisions of Article 1, Section 9 of the Constitution."

In *Lunsford* v. *Hudspeth*, 126 Fed. 2d 653, 659 (CCA 10-1942): "Its function or use should not be construed or employed so narrowly as to defeat the salutary purpose it serves in our system of government."

See *Ochikubo* v. *Bonesteel*, 60 Fed. Supp. 916 (1945). See *In re Yamashita*, 327 U. S. 1 (1946), at page 23.

Lord Halsbury, Lord Chancellor, in *Cox* v. *Hakes*, (1890) L. R. 15 App. Cas. 506, 527, 528: "The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

Respectfully submitted,

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I certify that this motion for rehearing is presented in good faith and not for delay.

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